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In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. _____

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CITY OF BELLEVUE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

o———o———o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

o———o———o

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PRIESMAN GRAPHICS — OMAHA, NEBRASKA

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The petitioner, City of Bellevue, Nebraska, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on January 10, 1973.

OPINIONS BELOW

The Memorandum and Decision of the trial Court is reported at 334 F. Supp. 881, and appears herein under Appendix A. The principal opinion of the United States Court of Appeals for the Eighth Circuit is reported at 474 F. 2d 473, and appears herein at Appendix B. A slight modification was made in the principal opinion on rehearing and that modification appears herein at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on January 10, 1973. A timely petition for rehearing was denied on March 1, 1973, and this petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether the annexation by the City of Bellevue, Nebraska of the Offutt Air Force Base-Capehart Housing complex is illegal under the statutes and case law of the State of Nebraska.

2. Whether the annexation was improperly undertaken for revenue purposes only, when the sole fiscal benefit to the City was "revenue sharing" on a per capita basis.

3. Whether the annexation would interfere with the national security to such an extent as to justify a permanent restraining order.

STATUTORY PROVISIONS INVOLVED

N.R.S. 1943, Section 16-101. "Cities of the first class, defined; population required. All cities having more than five thousand and not more than one hundred thousand inhabitants, as may be ascertained and officially promulgated by the United States or under the authority of the mayor and city council of any such city, shall be known as cities of the first-class."

N.R.S. 1943, Section 16-117. "Annexation: powers. The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance, except as provided in sections 19-2501 to 19-2508, and amendments thereto, at any time, include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, street, or highways as are urban or suburban in character, and in such direction as may be deemed proper. Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first-class over any agricultural lands which are rural in character."

STATEMENT OF THE CASE

The defendant, City of Bellevue, Nebraska, is a duly incorporated city under the laws of the State of Nebraska and by population is classed by the State of Nebraska as a first-class city. Bellevue is physically situated in the eastern end of Sarpy County, and located in the rapidly growing metropolitan area surrounding the City of Omaha. To illustrate its rapid growth, the population of Bellevue has grown from 3,831 in 1950 to 8,840 in 1960, by special federal census in 1966 to 17,496 and by the 1970 census the total population of 21,953. See: Report, U.S. Dept. of Commerce Bureau of Census, Series P-28 No. 1498, March 3, 1970. This constant growth has created unusual problems. New

streets, improvements of old streets, new schools, increased police and fire protection, water plant and water distribution construction, sanitary and storm sewer development, establishment and expansion of inferior court systems, expansion of library and recreational facilities to mention a few of the problems faced and met by the City of Bellevue in the last twenty-five (25) years.

Sharing in this growth and also in fact causing it, has been the location of Offutt Air Force Base immediately adjacent to the City of Bellevue. From fifty (50) percent to seventy (70) percent of the population of Bellevue is connected in various ways with the military installation at Offutt, either as members of the United States Air Force or civilian employees at the installation. All of the thousands of children on the base and in the Capehart area attend the Bellevue school system, and in short the Air Force and the City are entwined in a community of interest which defies separation and demands annexation.

Offutt Air Force Base is located immediately south of the present city limits of Bellevue. The base itself is completely contiguous on three sides to the city and housing, commercial and industrial development within the city limits are immediately adjacent to the base on the north and west. This restricts Bellevue's zoning, planning and development control for the rapidly expanding areas that lie south and west of the south boundaries of Offutt. The same restrictions are true as to the physical location of the Capehart housing area.

In addition, because of a change in the basic taxing methods in Nebraska, population has become an important factor for financial reasons. A major source of all municipal revenue is now

returned to them by the State, computed upon the basis of the number of people within the city limits.

With the problem of growth facing them, the change in the tax base in Nebraska, the demand for municipal services in all forms, the City Council of the City of Bellevue felt it wise to, and did, annex the Offutt Air Force Base and the Capehart housing area.

At this point, the United States sought and obtained injunctive relief in the United States District Court for the District of Nebraska, restraining the City from annexing the Base. This order was affirmed by the United States Court of Appeals for the Eighth Circuit.

The District Court as well as the Court of Appeals based the decision on two grounds:

(1) The annexation under the law of Nebraska is improper because it was undertaken for "revenue purposes alone."

(2) The annexation of this military enclave might interfere with the interest of the United States in providing for the national security.

It is noteworthy that the United States has assumed exclusive jurisdiction of Offutt Air Force Base and the headquarters of the Strategic Air Command. According to the testimony in this case, authorities of the City of Bellevue would not even be permitted to enter upon the Base without permission from the military authorities.

REASONS FOR GRANTING THE WRIT

A grave error has been made by the trial Court and the Court of Appeals in this case. Annexation has been denied because the Court felt annexation for "revenue purposes alone" is contrary to the case law of Nebraska dealing with annexation. True, this language is found in the four Nebraska cases,[1] now familiar to all of us involved in this litigation. However, the cases must be read in the light of their factual situation. The cases were decided in 1901, 1915, 1933 and 1936. In every instance, there was an attempt by the municipality to annex agricultural land, rural in character, for revenue purposes. No one had heard of the now popular revenue sharing thirty-seven years ago. These were cases where the land was to be burdened with the tax and the cases were in defense of that burden.

Bellevue is completely surrounded by the Missouri River on the East, the City of Omaha on the North and the military on the South and West. There is no place to go — no way to extend their controls for orderly growth. Bellevue has added obligations by reason of the pressures of all these people and it is only reasonable that with the added duty should go the customary privilege of raising money to meet the added burden. Bellevue should be permitted to participate to the extent possible in the machinery designed to benefit local communities under our present tax structure.

The trial Court and the Court of Appeals, to a lesser extent, gave lip service to the worldwide importance of the Strategic Air

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1. *Witham vs. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933); *Hustead vs. Village of Phillips*, 131 Neb. 303, 267 N.W. 919 (1936); *Joerger vs. Bethany Heights*, 97 Neb. 675, 151 N.W. 236 (1915); *Village of Osman vs. Smathers*, 62 Neb. 509, 87 N.W. 310 (1901).

Command headquarters. We all recognize that it is the home office of the nuclear deterrent force of the free world. Certainly, adequate protection is afforded this military base by the fact that the United States has assumed exclusive jurisdiction. The case of *Howard v. Commissioners*, supra 344 U.S. 64 (1953) announced that there is nothing particularly sacred about a federal military enclave and said that all other things being equal they may be annexed. The *Howard* case certainly does not discuss the relative importance of the mission of the military base and the same is not a consideration in the question of annexation.

CONCLUSION

The City of Bellevue, in its attempts to annex Offutt Air Force Base and the Capehart Housing Area, was exercising its constitutional and statutory legislative functions under the laws of the State of Nebraska. This has been interfered with by the United States Government. The trial Court and the Court of Appeals has endorsed this interference, and in doing so, have relied upon ancient decisions completely out of keeping with present tax structures, and fiscal policies. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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PROOF OF SERVICE

I, Dixon G. Adams, one of the attorneys for petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on May 25, 1973, three copies of the Petition for Writ of Certiorori, together with the accompanying Appendix were mailed, postage prepaid, to Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

DIXON G. ADAMS
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Bellevue, Nebraska
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIVIL NO. 03267

UNITED STATES OF AMERICA, Plaintiff,

vs.

CITY OF BELLEVUE, NEBRASKA, et al.,
Defendants.

MEMORANDUM AND ORDER
(Filed November 2, 1971)

APPEARANCES: For Plaintiff — Richard A. Dier, United States Attorney for the District of Nebraska. For Defendants — David Lathrop, Esq. and John Rice, Esq.

ROBINSON, Chief Judge.

THIS MATTER comes before the Court after hearing upon plaintiff's application for a permanent injunction against the defendants.

The defendant, City of Bellevue, Nebraska, has duly enacted an ordinance[1] purporting to annex approximately 1898 acres of real estate officially designated as Offutt Air Force Base, and approximately 721 acres of real estate known as "the Capehart Housing Area." All of the said real estate is located in Sarpy County, Nebraska, and the plaintiff, United States of America, is

the owner in fee of said real estate, which totals approximately 2619 acres. There are approximately twelve thousand military personnel and their dependants living in Government quarters, this total being equally divided between these two main areas of real estate.

The plaintiff exercises exclusive legislative jurisdiction over that portion of real estate known as Offutt Air Force Base. This is clear from the case of Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 256 [1956], wherein Justice Frankfurter writing the majority opinion stated that: "Offutt Air Force Base falls within the scope of Article I §8, cl. 17 of The United States Constitution . . ."[2]

However, as to that portion known as the Capehart Housing area, all parties are agreed that although owned by the plaintiff, it remains subject to the legislative jurisdiction of the State of Nebraska.

After the enactment of the annexation ordinance, the plaintiff, United States, filed its complaint in the present action, seeking to enjoin the enforcement of said ordinance. This Court issued a temporary restraining order on April 17, 1969 [Filing No. 3] enjoining the defendants herein from effectuating the ordinance, a preliminary injunction to the same effect was issued by this Court April 25, 1969 [Filing No. 7]. The Court must now decide whether said injunction should be made permanent.

In resolving this controversy, the Court must first determine whether the defendant, City of Bellevue, Nebraska, has the power and authority to annex the realty in question. And, this Court has concluded that the United States Supreme Court decision in Howard v. Commissioners of the Sinking Fund of the City of

Louisville, 344 U.S. 624 [1953], requires that the question be answered in the affirmative.

In Howard an area encompassing a Naval Ordinance Plant within the State of Kentucky had been acquired by a United States condemnation proceeding. The State consented to the acquisition and the United States accepted exclusive jurisdiction over the area. The Supreme Court held that the fact that the land was under the "exclusive jurisdiction" of the United States did not ban its subsequent annexation by the City of Louisville.

In so holding the Court said, as follows:

> "The appellants first contend that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. With this we do not agree. When the United States, with the consent of Kentucky, acquired the property upon which the Ordinance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with state law, the area became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky. A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jursidiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

> "This question has been before other state courts, and the right to annex has been upheld. Wichita Falls v. Bowen, 143 Tex. 45, 52, 192 S.W. 2d 695, 699; County of Norfolk v. Portsmouth, 186 Va. 1032, 1047, 45 S.E. 2d 136, 142-143. We agree with these cases and hold that Louisville was free to annex the Ordinance Plant area." 344 U.S. at 626-27.

The Court then held in Howard that the city could tax income paid to employees of the United States who worked at the Ordinance Plant, pursuant to 4 U.S.C. §§105-110, known as the Buck Act, by which Congress had specifically given states and state subdivisions the right to levy and collect income taxes in any federal area.

However, the Court made it clear that cities, even after an annexation of a federal area, could neither tax nor regulate such an area, except when such taxation or regulation is clearly granted to the cities by an Act of Congress. The Court said:

> "Even though the Ordinance Plant is within the boundaries of the City of Louisville pursuant to the annexation, exclusive jurisdiction over the area still remains with the United States, except as modified by statute, U.S. Const. Art. I, §8 cl. 17; Surplus Trading Co. v. Cook, 281 U.S. 647, 652, 344 U.S. at 627."

Thus, it is the conclusion of this Court that under federal laws, the City of Bellevue has the power and authority to annex both Offutt Air Force Base and the Capehart Housing area, and may tax and regulate in those areas to the extent permitted by the Congress of the United States.[3]

However, the aforesaid determination does not resolve the question regarding the propriety and legality of the annexation under the State law of annexation. The Howard case does not

offer any guidance in this regard, for one can only infer from a reading of the case that the Court decided, without stating its reasons, that the annexation involved therein otherwise complied with Kentucky's law governing annexation.

It might be contended that since Nebraska not federal law controls the legality of the annexation involved herein, this Court should abstain from deciding this controversy and defer to the Nebraska courts.

However, in Zwickler v. Koota, 389 U.S. 241, 248 [1967], the Supreme Court held that a federal court should abstain and defer to the state courts only in "special circumstances."

The Court went on to point out that if a case involves a controlling, yet undecided, question of state law, the federal court, as a matter of comity, should abstain and allow the state courts to decide the state law question, since the requisite "special circumstance" would then be present.

In the present case, however, there can be no doubt that the basic principles of Nebraska's law of annexation are well established. Thus, the "special circumstance" discussed in Zwickler is no more present here than it was in that case. Neither does this Court discern any other "special circumstance" which would call for application of the judge-made abstention doctrine to this case.

The City of Bellevue, Nebraska, is a city of the first class and its power to annex surrounding territory is governed by Neb. Rev. Stat. §§16-117 through 16-121 [Reissue 1970].[4]

In challenging the purported annexation as being invalid under Nebraska law, the United States contends that an annexation ordinance of the defendant,[5] which was enacted prior to the one encompassing its realty, was invalid, in that it encompassed agricultural lands, rural in character, in violation of Neb. Rev. Stat. §16-117 [Reissue 1970].[6] It is contended that it was this annexation which put the City of Bellevue in a contiguous position with Offutt Air Force Base proper, and that since it was invalid any subsequent annexation beyond that point would also be invalid.

However, this Court need not decide the validity of that particular ordinance, because it appears from the record that the United States owned none of the land involved in the annexation pursuant thereto. The United States therefore has no standing to question the validity thereof, and this Court presumes that the ordinance and annexation were valid. One legal entity may not assert the rights or litigate the injury of another, as a general rule. E.g. Tileston v. Ullman, 318 U.S. 44 [1943]. There are, of course, exceptions, such as when it is impossible for the one who is injured to assert his own rights. E.g. NAACP v. Alabama ex rel Patterson, 357 U.S. 449 [1958]. This case is not an exception, however, and the general rule applies.

The United States next attacks the annexation ordinance embracing its realty,[7] by referring to it as patent gerrymandering. It uses the term in such a way as to connote a bad purpose by the defendants. Be that as it may, this Court does not intend to decide this case by the mere use of a label.

The plaintiff also alleges that the area comprising Offutt Air Force Base is of a kind of character not within the purview of the

Nebraska annexation statutes for cities, and that the area is not urban or suburban in character. It also alleges that the lands comprising the Capehart Housing area are not of the kind and character subject to inclusion in the defendant City, by annexation because they are neither contiguous nor adjacent to the City of Bellevue. It is also alleged that included in the area purportedly annexed are some agricultural lands not subject to annexation.

The Court has carefully reviewed the evidence in this case regarding the land character of the areas annexed as well as their contiguity, and is of the opinion that the evidence is contra to the plaintiff's allegations.

Plaintiff next contends that the City of Bellevue cannot provide to the inhabitants of Offutt Air Force Base any of the benefits required by Neb. Rev. Stat. §16-120 [Reissue 1970],[8] to be provided to the inhabitants of annexed territories, such benefits now being provided by the plaintiff and being completely beyond the capability and the authority of the City of Bellevue to provide.

It is also alleged that it is impractical for the City of Bellevue to provide to the inhabitants of the Capehart Housing area those benefits required by Neb. Rev. Stat. §16-120 [Reissue 1970], because of said housing area's distance from the City of Bellevue and its true character as having no true community of interest with the City of Bellevue.

However, Neb. Rev. Stat. §16-120 [Reissue 1970] provides that an annexing city has one year after the date of annexation within which to adopt plans for the services called for therein.

This Court cannot say that it would be impossible for the defendant City to comply with the statute within the time allotted thereby, and, thus, plaintiff's allegations are not at this time ripe for decision. In so holding the Court notes that the statute tolls the one year period during the pendency of any court action contesting the annexation.

All of the remaining allegations and contentions of the plaintiff, are either without legal merit or are too speculative for a determination at this time, except for one contention, which this Court views as dispositive of the case.

In Paragraph 13 on page 8 of the plaintiff's complaint [Filing No. 1] it is alleged:

> "13. That, on or about the 24th day of March, 1969, and specifically on the 25th day of March, 1969, the defendants, Mayor and Members of the City Council of the City of Bellevue, Nebraska, did publically state that their purpose in enacting the said Ordinance No. 940 was to include, as part of the City of Bellevue's population, the approximately twelve thousand persons residing in barracks and public quarters on Offutt Air Force Base and in the Capehart Housing area, thereby obtaining a larger share of Nebraska state tax receipts that are distributed to municipalities on a per capita basis."

The evidence supports this allegation. In fact the record is replete with evidence which establishes that the sole purpose for the enactment of Ordinance No. 940 by the City of Bellevue, was to increase the City's revenue, rather than expand the city boundaries in an orderly fashion.

The Nebraska Supreme Court has held that a municipality cannot annex territory for revenue purposes only. Witham v. City

of Lincoln, 125 Neb. 366, 250 N.W. 247 [1933]; Hustead v. Village of Phillips, 131 Neb. 303, 267 N.W. 919 [1936]; Joerger v. Bethany Heights, 97 Neb. 675, 151 N.W. 236 [1915]; Village of Osmond v. Smathers, 62 Neb. 509, 87 N.W. 310 [1901].

Thus, it is the conclusion of the Court that the purported annexation herein involved is invalid as being undertaken for an unlawful purpose.

In so holding this Court is not unmindful of the fact that Offutt Air Force Base is the headquarters of the Strategic Air Command, to which is assigned the overwhelming majority of the nuclear deterrent power of the free world.

Justice Vinton in writing the majority opinion in Howard, supra, stated that in this type of case "[i]t is friction, not fiction, to which we must give heed." 344 U.S. at 627. Surely this case represents the potential for friction with which this Court is to be concerned. If this Court were to sanction the annexation, the result would be to spawn an abundance of litigation between the United States and the City, every time the City enacted an ordinance purporting to effect the air base. This would be likely to occur even though the City was attempting to operate within the limited grants of Congress allowing it to regulate or tax within the federal enclave.

It is thus the finding of this Court:

[1] That the purported annexation is invalid as a matter of Nebraska law; and [2] that in any event the interests of the United States in providing for the national security without interference by individual states or their political subdivisions, outweighs any

interests of the City of Bellevue, Nebraska, in acquiring the territory encompassed by Offutt Air Force Base and the Capehart Housing Area. Accordingly,

IT IS ORDERED that the plaintiff, United States of America should and will forthwith prepare and submit to the Court, for approval or modification, a form of permanent injunction consistent with the findings set forth in this Memorandum.

Dated this 2nd day of November, 1971.

FOOTNOTES

1.

Ordinance No. 940

"AN ORDINANCE TO ANNEX TO THE CITY OF BELLEVUE, SARPY COUNTY, NEBRASKA, CERTAIN LANDS, LOTS AND REAL ESTATE LYING WITHIN THE BELOW DESGRIBED BOUNDARIES, TO THE CITY OF BELLEVUE, SARPY COUNTY, NEBRASKA, AND DESIGNATING EFFECTIVE DATE:

WHEREAS, all of the lots, lands and real estate lying within the boundaries described as follows, to-wit:

All of those parts of Sections 35 and 36, Township 14 North, Range 13 East, plus all those parts of Sections 1, 2, 3, 4, 9, 11, 12 and 13, Township 13 North, Range 13, East of the 6th P.M., Sarpy County, Nebraska, and more particularly described as follows:

All those parts of Sections 35 and 36, Township 14 North Range 13 East, lying South and West of the existing City Limits of the City of Bellevue, Nebraska.

All that part of the Southwest Quarter [SW¼] of Section 1 lying West of Tax Lots 22B, D1A2, and D1A1 together with that part of the Southwest Quarter [SW¼] of Section 1 lying South and West of Tax Lot 25.

All those parts of Sections 2, 11, 12 and 13, Township 13 North, Range 13 East, lying East of Highway 73-75 right-of-way, West of the County Board right-of-way and North of the Chicago, Burlington and Quincy Railroad right-of-way.

Beginning at the point of intersection of the East line of the C.B.&Q. Railroad right-of-way and the South Section line of Section 3, Township 13 North, Range 13 East; thence in a Southerly direction along the East line of the C.B.&Q. Railroad right-of-way to the point of intersection with the southerly right-of-way line of the County Road, also known as Capehart Road; thence in a Westerly direction along the Southerly right-of-way line Capehart Road; also known as Capehart Road; thence in a Westerly direction along the Southerly right-of-way line Capehart Road to the point of intersection with the East section line of Section 9, Township 13 North, Range 13, East; thence South along the East Section line of said Section 9, to a point which is 810 feet South of the Northeast corner of said Section 9; thence West a distance of 1,000 feet to a point; thence North along a line parallel to the East Section line of said Section 9 and Section 4, Township 13 North, Range 13 East to the point of intersection with the southerly right-of-way line of Capehart Road; thence in a northwesterly direction along the southerly right-of-way line of Capehart Road to the point of intersection with the East line of the Southwest Quarter [SW¼] of said Section 4; thence West to the Southwest corner of said Section 4; thence North to the Northwest corner of the South half [S½] of the Northwest Quarter [NW¼] of said Section 4; thence East to the Northeast corner of the South Half [S½] of the Northwest Quarter [NW¼] of said Section 4; thence North along the Quarter

Section line to a point 1,650 feet North of the center of said Section 4; thence East to a point on the East Section line of said Section 4 and said point being 1,650 feet North of the East Quarter corner of said Section 4; thence South to the Northwest corner of the South Half [S½] of the Northwest Quarter [NW¼] of Section 3; Township 13 North, Range 13 East; thence East to the Northeast corner of the South Half [S½] of the Northwest Quarter [NW¼] of said Section 3; thence South to the South Quarter corner of said Section 3; thence East to the point of beginning.

are contiguous and adjacent to the City of Bellevue, Nebraska, and are urban or suburban in character, and

WHEREAS, said real estate will receive material benefits and advantages from annexation to the said city,

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF BELLEVUE, NEBRASKA:

Section 1. All of the real estate lying within the area heretofore described be and the same hereby is included within the boundaries and territory of the City of Bellevue, Nebraska, and said lands and the persons residing thereon shall hereafter be subject to all of the rules, regulations, ordinances, taxes and all other burdens and benefits of other persons and territory included within the City of Bellevue, Nebraska.

Section 2. This ordinance shall take effect and be in full force and effect after its passage, approval and publication according to law.

Passed and approved this 24th day of March, 1969.

s Robert M. Haworth
Mayor

Attest:
/s/ Mary Stricklett
City Clerk"

2. U.S. Const. Art. I, §8, cl. 17, provides:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District [of Columbia] . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings . . ."

3. Under the reasoning of the Howard case, rejecting the "fiction of a state within a state," 344 U.S. at 627, the residents of a federal enclave have been accorded rights they could not possess if such a fiction were indulged in. See Evans v. Cornman, 398 U.S. 419 [1970].

4. Nebraska Statutes §16-117. "Annexation powers. The corporate limits of a city of the first class shall remain as before, and the mayor and council may by ordinance, except as provided in sections 19-2501 to 19-2508, and amendments thereto, at any time, include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper.

Such grant of power shall not be construed as conferring power upon the mayor and council to extend the limits of a city of the first class over any agricultural lands which are rural in character."

§16-118. "Annexation; lands, lots, tracts, streets, or highways; contiguous; exception. Lands, lots, tracts, streets, or highways

shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits."

§16-119. "Annexation; extraterritorial property use; continuation. Any extraterritorial property use regulations imposed upon any annexed lands by the city before such annexation shall continue in full force and effect until otherwise changed."

§16-120. "Annexation; inhabitants; benefits. The inhabitants of territories annexed to such city shall receive substantially the benefits of other inhabitants of such city as soon as practicable, and adequate plans and necessary city council action to furnish such benefits as police, fire, snow removal and water service must be adopted not later than one year after the date of annexation, and such inhabitants shall be subject to the ordinances and regulations of such city; PROVIDED, that such one-year period shall be tolled pending final court decision in any court action to contest such annexation."

§16-121. "Annexation; validation. Whenever a city of the first class lawfully reannexes territory which it had formerly annexed but which annexation was illegal because the statutes under which such original annexation was made were unconstitutional and void, [1] all contracts for public improvements, warrants and bonds issued by the city of the first class with respect to such territory and all payments made thereon shall thereby be validated, binding and legal upon such city of the first class in the same manner and with the same effect as if the original annexation had been lawful, [2] all obligations of any sanitary and improvement district assumed by a city of the first class with

respect to such territory shall thereby be validated, binding and legal upon such city of the first class in the same manner and with the same effect as if the original annexation had been lawful, and [3] such city of the first class may issue bonds under the appropriate statutes relating to public improvements to refund the warrants, warrant interest and any unpaid cost with respect to public improvements referred to in subdivision [1] of this section in the same manner and with the same effect as if the original annexation had been lawful."

5. Ordinance No. 929 of the City of Bellevue [July 22, 1968].

6. See note 3 supra.

7. See note 1 supra.

8. See note 3 supra.

ORDER
(Filed November 24, 1971)

Pursuant to the Memorandum and Order of this Court dated November 3, 1971, the Court, having found that Ordinance No. 940 of the City of Bellevue, Nebraska, purporting to annex certain property consisting of the Offutt Air Force Base and Capehart Housing area, Sarpy County, Nebraska, into the City of Bellevue, Nebraska, as being void and of no effect and the City of Bellevue and its officers and agents being permanently enjoined from taking any action pursuant to Ordinance No. 940 in connection with Offutt Air Force Base and Capehart Housing area located in Sarpy County, Nebraska,

IT IS, THEREFORE, ORDERED that Ordinance No. 940 of the City of Bellevue, Nebraska, purporting to annex the property consisting of Offutt Air Force Base and Capehart Housing area located in Sarpy County, Nebraska, into the City limits of Bellevue is void and of no effect and the City of Bellevue and its officers and agents are hereby permanently enjoined from taking any action pursuant to Ordinance 940 in connection with the annexation of Offutt Air Force Base and Capehart Housing area located in Sarpy County, Nebraska.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1003

UNITED STATES OF AMERICA, Appellee,

v.

CITY OF BELLEVUE, NEBRASKA, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Submitted: September 12, 1972.
Filed: January 10, 1973.

Before Bright and Stephenson, Circuit Judges, and Talbot Smith, District Judge.*

PER CURIAM

The case before us is unique. Neither diligence of counsel nor our independent research had disclosed a case on all fours. What we have presented is an attempt by the City of Bellevue, Nebraska, to annex a SAC (Strategic Air Command) base, indeed, its headquarters, and its adjacent housing area, referred to in the record as the "Capehart housing area."

*Hon. Talbot Smith, Senior United States District Judge, Eastern District of Michigan, sitting by designation.

The Offutt Air Base was described in the opinion of the District Court (permanently enjoining the annexation)[1] as "the headquarters of the Strategic Air Command, to which is assigned the overwhelming majority of the nuclear deterrant power of the free world." From this base, the record discloses, the proper authorities plan, manage, direct and control the "Strategic Nuclear Deterrant capacity of the free world; all of the B52 aircraft, all of the Minute Men and Titan missiles . . ." Here the Army, Navy, Air Force and foreign representatives sit together and "plan and coordinate the targeting of all the nuclear weapons that the free world has under its control." From here also is controlled the Flying Command Post, which is in the air 24 hours per day, and here is stationed the Wing which processes "all of the recognizance [sic. reconnaissance] data" collected by SAC and other military agencies both photographic and electronic, as well as the "Air Weather Control," that collects meteorological data, from world-wide sources, including satellites, processes such data, and distributes throughout SAC (the Strategic Air Command) and the United States Air Force, world wide. In addition, there are certain Groups whose missions are classified.

The Air Base itself is under the exclusive legislative jurisdiction of the Federal government.[2] U.S. Const. Art. I, §8, cl. 14. The Capehart housing area, on the other hand, although owned by the United States, is subject to the legislative jurisdiction of the State of Nebraska. So far as federal (as distinguished from state) law is concerned, the City of Bellevue has the power and the authority to annex the realty in question and it may "tax and regulate in those areas to the extent permitted

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1. The opinion, *United States v. City of Bellevue, Nebraska* is reported in 334 F. Supp. 881 (D. Neb., 1971).

2. *Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 (1956).

by the Congress of the United States." *Howard v. Comm'rs of the Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953); *Evans v. Cornman*, 398 U.S. 419 (1970). There is no challenge before us as to these matters.

In view of the unique and peculiar nature of the area, militarily dominated and oriented as it is, having little community of interest with near-by Bellevue, providing in substantial part to our necessary community facilities, the inevitable threshold question arises as to why annexation would be sought. The sole purpose, held the District Judge, was to increase Bellevue's revenues. If Bellevue could include as a part of its population count the 12,000 persons residing in the barracks and quarters on the Offutt Base and in the Capehart area, it could obtain "a larger share of Nebraska state tax receipts that are distributed to municipalities on a *per capita* basis." Such was the Government's allegation, found by the trial court to be supported by a record "replete" with evidence thereof. We have held repeatedly that we do not set aside the findings of fact by a trial judge sitting without a jury unless it is clear that they are without adequate evidentiary support. *Manning v. Jones*, 349 F. 2d 992 (8th Cir., 1965); *Jackson v. Hartford Accident and Indemnity Co.*, 422 F. 2d 1272 (8th Cir., 1970); *cert. denied*, 400 U.S. 855 (1970). Here there was substantial evidence in the record supporting such findings.

The legal effect of this factual finding was examined by the Nebraska Supreme Court in *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933), and the rule thereon stated as follows:

> "This court has held that a municipality cannot annex property for revenue purposes, as appears to have been done in the case at bar. *Joerger v. Bethany Heights*, 97 Neb. 675, 151 N.W. 236; *Village of Osmond v. Smathers*, 62 Neb. 509, 87 N.W. 310 (250 N.W. at 249).

Thus, it was the conclusion of the District Court upon such authority that the annexation was invalid as far as for an unlawful purpose.

The appellant, however, urges to us that the cases cited in support of the holding all pertained to "strictly agricultural land that was rural in nature," and argues that all of the cases cited stand merely for the proposition that "Annexation of agricultural land, rural in character, cannot be accomplished for tax purposes only" pointing out that the statutes of Nebraska now exempt agricultural land from annexation.[3] From this the conclusion tendered is that the doctrine of the *Witham* case *supra*, that a municipality cannot annex property for revenue purposes, no longer is the Nebraska law.

The argument is ingenious but not persuasive. The proscription against annexation for revenue purposes only is not so restricted. It finds widespread application in both case and statutory law. Thus, the sister state of Iowa provides by statute[4] that an annexing municipal corporation must show that it is capable of extending substantial services and benefits not theretofore enjoyed "so that the proposed annexation will not result merely in increasing the revenue from taxation" of such municipal corporation, and the Supreme Court of Oregon has enjoined a proposed annexation by the City of Estacada of the "River Mill Plant" of its General Electric Company where the "inclusion of plaintiff's property was unreasonable and where the annexation was employed for the sole purpose of enhancing the revenues of the city . . ."[5] Moreover, and returning to Nebraska

3. Nebraska Reissue of Revised Statutes, 1943, §16-117.

4. I.C.A. §362.26, para. 6.

5. *Portland General Electric Co. v. City of Estacada*, 241 P. 2d 1129 (1952).

law, we find no intimation in the opinions relied upon to so restrict the salutary doctrine to the degree that appellant suggests. The more accurate view is well expressed in *Basis of Annexation of Territory by Municipal Corporations*, 21 Iowa L.R. 128, 133 (1935), wherein it is said, "The courts have not allowed municipalities, under the guise of annexing adjoining property, to acquire territory simply for the purpose of raising revenue, and especially have the courts scrutinized the proceedings to determine the existence of this element when agricultural land was involved." See, generally, *McQuillin on Municipal Corporation*, 3rd Ed., Annexation, §7.10-7.23, particularly the latter.

The lower court relied also upon the warning expressed in *Howard v. Comm'rs of the Sinking Fund of the City of Louisville*, *supra*, with respect to the annexation of federally owned land on which a Naval Ordnance Plant was located, stating that "It is friction, not fiction, to which we must give heed." In view of the nature of the property here sought to be annexed, being the headquarters, of the Strategic Air Command, the court felt a "potential for friction" with the City of Bellevue pressing upon the Court, indeed that the interests of the United States in its national security outweighed any interests of the City of Bellevue in acquiring the property. The appellant, on the other hand, points to the present lack of friction in the Capehart area and stresses tht the court referred to "potential danger that may arise from city ordinances yet to be passed." In view of the abundance of litigation as to federal-state-municipal powers and functions with respect to annexed military reservations, see Hammack, *Annexations of Military Reservations by Political Subdivisions*, 11 Mil. L.R. 99 (1961), we cannot say that the court's apprehensions were unfounded. But in the view we have taken of

the case as to the unlawfulness of annexation for revenue purposes only, we do not reach this point. Nor do we consider the problem of annexation, *vel non*, of Capehart housing area. The annexation here authorized by the municipality, and enjoined by the lower court, consisted of both the above described base and housing area adjacent thereto.

Affirmed.

A true copy.

Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 72-1003

UNITED STATES OF AMERICA, Appellee,

v.

CITY OF BELLEVUE, NEBRASKA, Appellant.

OPINION ON PETITION FOR REHEARING

BEFORE: BRIGHT AND STEPHENSON, CIRCUIT JUDGES AND TALBOT SMITH, DISTRICT JUDGE*

*Hon. Talbot Smith, Senior United States District Judge, Eastern District of Michigan, sitting by designation.

PER CURIAM

In response to a Petition for Rehearing and Suggestion for Rehearing En Banc, the opinion of the Court is modified by adding to the last paragraph thereof the following:

> Our affirmance rests on the fact that the base area is included in the annexation. We reiterate that whether the city of Bellevue might annex the Capehart house area alone is not a matter now before us, nor do we intend to decide that issue.

In light of this modification the Court denies the Petition for Rehearing En Banc for the reason that the Petition has failed to obtain the vote of a majority of the Circuit Judges who are in regular active service. A rehearing before the panel is likewise denied.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1591

CITY OF BELLEVUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner, the City of Bellevue, Nebraska, enacted an ordinance purporting to annex the Offut Air Force Base and its nearby Capehart Housing Area. The government brought this suit for an injunction in the federal district court, challenging the annexation on state and federal grounds. The district court held the ordinance, and thus the purported annexation, "invalid as a matter of Nebraska law" (Pet. App. 18). The court of appeals affirmed, also solely on the basis on state law (Pet. App. 26-32).

2. Petitioner does not urge that it was in any way improper for the courts below to decide the issues of state law those courts deemed dispositive. The petition

contends merely that the courts below misinterpreted, and therefore misapplied, the relevant Nebraska Supreme Court decisions which both courts below discussed in their opinions and purported to follow. These issues of state law were fully considered, and in our view correctly decided, by the courts below; they warrant no further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.